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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 4(g) of the Cable Television Consumer Protection Act of 1992	)))	MM Docket No. 93-8

STATEMENT OF RODNEY A. SMOLLA IN SUPPORT OF THE
COMMENTS OF SILVER KING COMMUNICATIONS, INC.

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SUMMARY OF ARGUMENT

Given the overwhelming record evidence of Silver King Communication, Inc.'s ("SKC") extensive public interest programming, much of it locally produced, the only conclusion the Commission can reach on the merits under the well-established public interest standard is that the television stations owned and operated by SKC are operating in the public interest, convenience and necessity and, therefore, are entitled to must-carry status pursuant to section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992. Serious constitutional considerations also preclude the Commission from reaching any other conclusion:

(1) At the outset, this entire proceeding is constitutionally sensitive because it subjects one class of broadcasters, those offering a home shopping format, to additional burdens not imposed on any other class of broadcasters based solely on the content of programming they offer. To the extent that section 4(g) is grounded in a belief by some members of Congress that home shopping formats do not serve the public interest, it comes

dangerously close to constituting an unconstitutional Bill of Attainder.

(2) The public interest inquiry historically and properly has been an individualized inquiry engaged in during the normal licensing cycle. To make a class-wide determination in this proceeding that certain broadcasters are no longer operating in the public interest by definition would be to discriminate against one class of broadcasters by engaging in precisely the sort of content-based distinctions that the Supreme Court consistently has denounced.

(3) To conclude that the SKC owned and operated stations are operating in the public interest for purposes of licensing but not for purposes of must-carry eligibility would be to inject a content-based distinction into the public interest test that would operate to the detriment of only one class of broadcasters, those that have chosen a home shopping format. Government regulation that discriminates purely on the basis of the content of speech is per se unconstitutional.

(4) Discrimination based on the content of speech is impermissible even if the speech discriminated against is of a class with regard to which the First Amendment affords the government greater latitude to regulate. As the Supreme Court reaffirmed just last week in City of Cincinnati v.

Discovery Network, Inc.[1] if commercial and noncommercial speakers both contribute to the problem sought to be addressed by governmental regulation, the regulation cannot discriminate against the commercial speaker out of a perception that such speech is of "low value."[2] This would "attach more importance to the distinction between commercial and noncommercial speech than [the Supreme Court's] cases warrant and [would] seriously underestimate[] the value of commercial speech."[3] To be justified at all such discrimination must be based on a distinction between commercial and noncommercial speech that is related to a legitimate interest. Thus, assuming arguendo home shopping format broadcasters are engaged in commercial speech, the Commission cannot discriminate against them for reasons bearing no relationship to the rationale for providing greater latitude to regulate them in the first instance. The Commission cannot single out home shopping format broadcasters for specially disadvantageous treatment when the harm that it seeks to prevent -- impingement on cable operators' editorial discretion -- is caused by both commercial and noncommercial speech alike.

(5) Even if any disadvantageous regulation of the SKC owned and operated stations is properly analyzed under the

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1/ No. 91-1200, slip op. (U.S. March 24, 1993).

2/ Id. at 8.

3/ Id.

commercial speech doctrine, it would fail to pass muster. To the extent that SKC has been singled out in a manner that implicates Bill of Attainder and Separation of Powers concerns, it is doubtful that the governmental interests asserted are constitutionally legitimate at all, let alone "substantial." Any disadvantageous treatment of SKC penalizes speech that is fully lawful, and not misleading or fraudulent, merely because of dislike for its content. Because the SKC owned and operated stations broadcast not just commercial speech but locally produced public interest programming that fully satisfies all of their obligations as public trustees, any denial of eligibility for must-carry status based on the content of their entertainment programming would fail the requirement that commercial regulation be narrowly tailored. Most fundamentally, denial of must-carry status to the SKC owned and operated stations based on the commercial content of their entertainment programming would dramatically underestimate both the constitutional protection for and public interest in SKC's commercial programming. The free flow of commercial information is guaranteed by the First Amendment and is of vital interest to local and national economies.

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To the Commission:

STATEMENT OF RODNEY A. SMOLLA IN SUPPORT OF THE COMMENTS OF SILVER KING COMMUNICATIONS, INC.

On behalf of Silver King Communications, Inc. ("SKC"), I am submitting this statement in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[4/]

I. INTRODUCTION

A. Qualifications

I am the Arthur B. Hanson Professor of Law, and the Director of the Institute of Bill of Rights Law, at the College of William and Mary, Marshall-Wythe School of Law. I write and speak extensively on constitutional law issues, particularly on First Amendment matters. My most recent book, Free Speech in an Open Society, was published in April 1992 by Alfred A. Knopf. My other books include: Suing the Press: Libel, the Media, & Power (Oxford University Press 1986) (which received the ABA Gavel Award Certificate of Merit in 1987); Law of Defamation (Clark, Boardman Publishing Co. 1986), a legal treatise; Jerry Falwell v.

4/ Notice of Proposed Rulemaking, 8 FCC Rcd. 660 (1993) (hereinafter "Notice").

Larry Flynt: The First Amendment on Trial, (St. Martin's Press 1988; paperback edition by University of Illinois Press); and Constitutional Law: Structure and Rights in Our Federal System (co-authored with Professors Daan Braverman and William Banks) (Matthew Bender & Co. 1991), a law school casebook.

B. Background

In June 1992, I prepared the Statement of Rodney A. Smolla Concerning the Scope of the Must-Carry Provisions of the Cable Television Consumer Protection and Competition Act of 1992 for presentation to Congress on behalf of Home Shopping Network, Inc.[5/] That statement contained a

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5/ Prior to December 28, 1992, Home Shopping Network, Inc. ("HSN") owned and operated as subsidiaries the licensees of twelve television stations: Silver King Broadcasting of

constitutional law analysis of the mandatory cable carriage or "must-carry" provisions of House and Senate bills, HR-4850 and S-12, respectively. Included within the House version of the bill, but not in the bill passed by the Senate, was a proviso stating:

> (f) SALES PRESENTATIONS AND PROGRAM LENGTH COMMERCIALS. -- Nothing in this Act shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or program length commercials.[6/]

My statement concluded, among other things, that the Breaux Amendment would render the must-carry rules unconstitutional because it introduced content-based discrimination into the otherwise carefully crafted must-carry scheme. The Committee on Conference subsequently rejected the Breaux Amendment and adopted a compromise position that ultimately was approved by both houses of Congress as section 4(g) of

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5/ (...continued)
which is now the parent of the licensees. See FCC File Nos. BTCCT-920918KD, KF-KJ, KL-KN, KP-KT. These stations will be collectively referred to as the "SKC Stations." The SKC Stations all carry the programming of the Home Shopping Club, which is provided by HSN.

6/ H.R. 4850, 102d Cong., 2d Sess. § 614(f) (1992). The language for this exception originated with an amendment offered by Senator Breaux to S-12, popularly referred to as the "Breaux Amendment" in the debate over whether HSN broadcast stations should be included within the must-carry requirements of the Act.

the Cable Television Consumer Protection and Competition Act of 1992.[7]

Subsection (g) requires the Commission to determine whether home shopping format stations are serving the public interest, convenience and necessity. The Commission is to engage in this proceeding without regard to its determination that nearly 100 television stations with a home shopping format have been licensed by the Commission as serving the public interest, convenience and necessity, many of them on more than one occasion. In its Notice, the Commission posits three possible outcomes of this extraordinary congressionally-mandated inquiry: (1) home shopping format stations are again found to be operating in the public interest, and thus become eligible for mandatory cable carriage; (2) despite their prior licensing history, home shopping format stations are found not to operate in the public interest and their operations are therefore terminated or modified; or (3) home shopping format stations, or some subset of them, although operating in the public interest for purposes of broadcast license renewal are nevertheless not operating in the public interest for purposes of section 4(g) of the 1992 Cable Act and therefore are not eligible for mandatory cable carriage.[8]

7/ Pub. L. No. 102-385, 106 Stat. 1460, 1475 (1992) ("the Act" or "the 1992 Cable Act").

8/ Notice, at 662.

Two of these three alternatives raise serious constitutional concerns to which this statement is addressed. First, the Constitution does not permit the Commission to conclude that home shopping format stations as a class are not operating in the public interest and, therefore, that their operations should be terminated or modified. The public interest inquiry historically and properly has been an individualized inquiry engaged in during the normal licensing cycle. To make a class-wide determination that certain broadcasters are no longer operating in the public interest by definition would be to discriminate against one class of broadcasters by engaging in precisely the sort of content-based distinctions that the Supreme Court has consistently denounced. Recent decisions of the Court make clear that even when the speech at issue takes place in a context in which the government has traditionally enjoyed wide latitude to regulate content-

Cincinnati v. Discovery Network, Inc.,[9/] decided by the Court last week. As the Supreme Court clearly reaffirmed, the government may not single out commercial speech for specially disadvantageous treatment when the harms that the government seeks to prevent are caused by both commercial and noncommercial speech alike.

Second, as established by the record evidence, as set out in detail in the Comments of Silver King Communications, Inc. ("SKC Comments"), the SKC Stations are operating in a manner fully consistent with the Commission's customary public interest standard. If the Commission nevertheless were to conclude that home shopping format stations, although operating in the public interest for purposes of license authorization, are not operating in the public interest for the purpose of eligibility for mandatory cable carriage, it would be making an impermissible content-based distinction among similarly situated broadcasters, denying a significant benefit only to the class of broadcasters that have chosen a home shopping format. Thus, the only outcome the Commission can reach consistent with the Constitution is that the SKC Stations are eligible for must carry.

9/ No. 91-1200, slip op. (U.S. March 24, 1993).

II. ARGUMENT

A. In Satisfying Its Obligation Under Section 4(g) To Conduct This Extraordinary Inquiry, the Commission Should Be Sensitive to the Constitutional Delicacy of This Proceeding.

At the outset, the Commission should appreciate that this entire proceeding, while congressionally mandated, is constitutionally sensitive. Congress has placed the Commission in an awkward and delicate position, and the Commission must proceed cautiously to avoid running afoul of its independent duty to regulate in a manner consistent with the First Amendment. This proceeding subjects one class of broadcasters, those offering a home shopping format, to additional burdens not imposed on any other class of broadcasters solely because of the content of the programming they offer. Section 4(g) requires that the Commission scrutinize whether stations broadcasting a home shopping format are operating in the public interest, convenience and necessity outside of the context of a renewal or licensing proceeding when such an inquiry is ordinarily undertaken. No other similarly situated broadcasters are subjected to such scrutiny.

Moreover, Congress has made no attempt to hide the fact that this additional burden is being imposed on home shopping format broadcasters alone -- solely because of

their choice of programming format.[10/] This is apparent from Senator Breaux's statements during a mark-up hearing on S-12, the precursor to section 4(g), held before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation on May 14, 1991. Senator Breaux candidly expressed his view that broadcast stations that offer a home shopping format, such as the SKC Stations, should be denied the benefits of must carry because in his judgment the Commission should never have licensed them in the first place because of the content of their programming:

> [T]he FCC has really dropped the ball in allowing at least 100 UHF stations to become "broadcast stations" when in fact they do not meet the public interest test of the Communications Act of 1934 . . . . I do not think the FCC should have allowed [any home shopping format station] to become a broadcast station under the meaning of the Act . . . . Home Shoppers [sic] Network, which has acquired all of these broadcast stations, I would

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10/ Some members of Congress recognized the constitutionally flawed underpinnings of the Breaux Amendment, the precursor to Section 4(g): "This amendment is a clear case of content regulation . . . . Content regulation is a clear assault on the first amendment. In fact, the amendment currently before us approaches a bill of attainder. We are taking away the right of access from a legitimate business." 138 Cong. Rec. S572 (daily ed. Jan. 29, 1992) (remarks of Mr. Reid); id. at S575 (remarks of Messrs. Graham and Pressler); id. at S579 (remarks of Mr. Danforth). Similarly, fourteen senators joined in an August 5, 1992 letter to Senator Hollings pointing out the constitutional defect in the Breaux Amendment: "The House [bill which included language denying certification to home shopping stations] will exclude from must carry protection only those 46 stations nationwide which predominantly broadcast sales presentations. This provision discriminates against shopping services solely on the basis of content and thus is of questionable constitutional validity."

> submit is not meeting these public interest tests, and as a result should not have the benefit of being a must carry with regard to the cable operators.[11/]

"A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."[12/] In Simon & Schuster, the Supreme Court struck down New York's so-called Son-of-Sam statute, which required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account; the funds were to be made available to the victims of the crime and the criminal's other creditors. In striking down the statute the Court cautioned that "it bears repeating" that "[i]n the context of financial regulation . . . the Government's ability to impose content-based burdens on speech raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[13/] Section 4(g), like the Son-of-Sam statute at issue in Simon & Schuster, imposes additional financial burdens on one class of speakers based

submit to this very proceeding. In addition, it "indirectly . . . favor[s] certain classes of speakers [non-home shopping format stations] over others [home shopping format stations] . . ." by not subjecting them to this extraordinary proceeding and the financial burden it entails.[14/]

To the extent that section 4(g) is grounded in the sincere belief by some members of Congress that home-shopping formats do not serve the public interest, the provision indulges in a form of legislative judgment that is constitutionally suspect for reasons that reach beyond First Amendment doctrines. The Commission has licensed the SKC Stations based on the determination that their programming content satisfies the public interest standard established by Congress in the Communications Act of 1934. Perhaps some members of Congress would not have made the same administrative determination as the Commission as to these,

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14/ See Home Box Office, Inc. v. FCC, 567 F.2d 9, 47-48 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

Section 4(g)'s disparate treatment of similarly situated broadcasters also violates the Equal Protection Clause. The Supreme Court has held that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972). Section 4(g) confers a benefit on all broadcasters except those that elect to provide home shopping programming based solely on Congress's view that home shopping programming is less deserving of this benefit than the programming of other similarly situated broadcasters.

or other, particular candidates for licensure. But having once established substantive statutory principles guiding administrative discretion, it is not for Congress to intervene selectively to micro-manage the implementation of those standards, for to do that is to engage in a type of adjudicatory decision-making inappropriate for the legislature in our constitutional scheme.[15/]

This principle was eloquently articulated by Justice Lewis Powell in his opinion in Immigration and Naturalization Service v. Chadha,[16/] the "legislative veto" case. There, Justice Powell noted that the House of Representatives had exercised functions traditionally reserved for other branches:

> On its face, the House's action appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches.[17/]

Justice Powell noted that the Framers' apprehensions concerning attempts by the legislature to apply and implement legal standards in particularized situations were

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15/ As Chief Justice John Marshall explained in Fletcher v. Peck, 10 U.S. 87, 136 (1810): "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."

16/ 462 U.S. 919, 959-67 (1983) (Powell, J., concurring)

17/ Id. at 964-65.

embodied in the Constitution both in the specific prohibition of the Bill of Attainder Clause,[18] and in the Constitution's general scheme of separation of powers: "Their concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person was expressed not only in this general allocation of power," Justice Powell noted, "but also in more specific provisions, such as the Bill of Attainder Clause."[19]

Congress's attempt to regulate the communications field in a manner that singled out one media enterprise for specially disfavored treatment was struck down in News America Publishing, Inc. v. FCC.[20] In News America, the law in question modified cross-ownership rules in a manner that uniquely burdened communications firms controlled by Rupert Murdoch. In striking down the legislation, the court noted that "Congress' exclusive focus on a single party clearly implicates values similar to those behind the constitutional proscription of Bills of Attainder."[21]

Given all of Section 4(g)'s constitutional infirmities, the Commission should proceed with caution in conducting these proceedings.

18/ Art. I, § 9, cl. 3.

19/ 462 U.S. at 962.

20/ 844 F.2d 800 (D.C. Cir. 1988).

21/ Id. at 813.

In complying with Congress's mandate, the Commission cannot lose sight of its obligation to act consistent with the Constitution.[22] As the Commission has recognized, it cannot conduct this rulemaking in a vacuum but must consider the constitutional implications of its actions. Thus, "the Commission, in making its public interest determinations, is obligated to consider the potential effect upon First Amendment Principles."[23]

B. Aside From Its Constitutional Obligations, the Commission Should Be Particularly Careful Not To